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IN THE

Supreme Court of the United States

October Term, 1968.

No. .

PHILIP CHUFF,

Petitioner,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, Jr., Commissioner of Education of the State of New York,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department.

Respondent Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler and John F. Murphy, Superintendent of Schools of said School District respectfully prays that the petition herein for a writ of certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department be denied.

Questions Presented for Review.

1. Whether the procedures before the Board of Education and the Tenure Commission were such as to require findings of fact within due process of law as guar-

anteed by the Fourteenth Amendment to the United States Constitution and further whether or not the determinations of these agencies, if such was required, in fact, amount to the making of findings of fact?

2. Whether the petitioner has properly raised and preserved the objection to the proceedings before the Board of Education as being an infringement upon his guarantee of free speech, and if so whether or not the facts of this proceeding come within the sanctions of such free speech guarantee?

3. Whether or not this Court may review the question of substantiality and sufficiency of the evidence to support the administrative determination under the guise of an alleged violation of the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

This is a proceeding commenced originally pursuant to Article 78 of the (former) Civil Practice Act in the State of New York, whereby petitioner sought to review, on the merits, the decision of the Commissioner of Education in the State of New York, which decision resulted from a review and recommendation of the Tenure Commission, dismissing petitioner from his job as a physical education teacher in the respondent school system. The matter arose by reason of the fact that during the summer of 1957, and just prior to the commencement of school in the fall of that year, petitioner received a letter from the Superintendent of Schools where he was employed as a physical education teacher which letter suggested that he seek employment with another school district. Petitioner chose to ignore this letter and thereafter he was summarily suspended from his duties as

physical education teacher, after reporting for school and work in September of 1957. Inasmuch as formal written charges had not, and were not, at that time actually prepared and served upon petitioner, he was reinstated to his position by the Supreme Court, State of New York. See: *Chuff v. Board of Education*, 6 A. D. 2d 987, 175 N. Y. S. 2d 936.

Thereafter the respondent, Superintendent of Schools, preferred formal written charges against petitioner and pursuant thereto a hearing was had before the respondent, Board of Education, during December of 1957. Following this hearing petitioner was dismissed from his position as physical education teacher with the respondent, School District, by virtue of a unanimous decision of the five member school board, which determination was made on December 21, 1957. Thereafter petitioner filed a requisite notice of appeal, pursuant to the then existing provisions of Section 3012 of the Education Law, with the Tenure Commission, which notice of appeal was dated December 28, 1957, and which notice of appeal was received and filed by the Tenure Commission on or about January 4, 1958.

After a careful review of the matter, the Tenure Commission by a unanimous opinion, found that the respondent Board of Education was fully justified in its decision that petitioner be dismissed, and upon the recommendation of the Tenure Commission, the Commissioner of Education made an Order dated February 4, 1959, whereby the Commissioner found that there was no basis for the substitution of his judgment for that of the Board of Education and the Tenure Commission and, therefore, ordered the recommendation of the Tenure Commission affirmed.

The proceeding which petitioner now seeks to review was commenced pursuant to then Article 78 of the Civil

Practice Act, by Order to Show Cause dated May 27, 1959, which matter came on for a hearing in Supreme Court, Albany County, on June 29, 1959. A decision was rendered therein transferring this matter to the Appellate Division and thereafter an Order was made pursuant to such decision, which Order was dated January 4, 1960.

After the execution of such Order on or about January 4, 1960, absolutely no further proceedings were had in this matter until such Order was filed transferring this matter to the New York State Supreme Court, Appellate Division, Third Judicial Department on or about December 19, 1967.

The specification of charges as originally presented against petitioner numbered some thirty-one (31), and after listening to the witnesses and hearing evidence on the trial herein, the respondent, Board of Education, by unanimous decision of its five members, found that the allegations against petitioner had been substantiated and upon such findings of fact, dismissed petitioner from his position as physical education teacher.

Through the review of this matter by both the Tenure Commission and the Commissioner of Education, the conclusion remained the same although the Tenure Commission found that *only* twenty-two (22) of the thirty-one (31) separate and distinct charges had been substantiated. Of course, however, upon such a finding of fact, the Tenure Commission, by unanimous decision affirmed the respondent, Board of Education, and after a full review of the record and upon the recommendation of the Tenure Commission, the Commissioner of Education again upheld and affirmed the finding of the respondent, Board of Education.

Thereafter the Supreme Court of the State of New York, Appellate Division, Third Judicial Department made a full review of this matter and made its decision which petitioner seeks to review herein which decision established that the record as a whole contains substantial evidence which cumulatively warranted the dismissal of the petitioner and further established that the action of the Commissioner of Education was not arbitrary and/or capricious.

It was at this time upon the argument upon the merits in the New York State Supreme Court, Appellate Division, Third Judicial Department, that petitioner first raised any question as to the violation of his constitutional rights, particularly with regard to an alleged violation to his right of free speech.

Again petitioner has attempted to preserve this argument upon his application for leave to appeal to the Court of Appeals, made both to the New York State Supreme Court, Appellate Division, Third Judicial Department and to the New York Court of Appeals and both applications have been denied. Petitioner has attempted to show that the argument with regard to free speech was "raised in substance" by his attorney at the hearing in this matter. The record however, is devoid of any reference to alleged violation of such constitutional mandate until the proceedings had reached the New York State Supreme Court, Appellate Division, Third Judicial Department.

Whether or not the Appellate Courts in the State of New York both the Supreme Court of the State of New York, Appellate Division, Third Judicial Department and the New York Court of Appeals, considered the constitutional question is a moot point upon this review inasmuch as petitioner failed to raise this objection until he reached the appellate level in this matter.

POINT I.

In the event that the proceedings before the Board of Education and Tenure Commission were such as to require findings of fact within the due process of law guarantee of the Fourteenth Amendment to the United States Constitution, such findings of fact were in effect made by both the Board of Education and the Tenure Commission.

Petitioner has argued in the Appellate Courts of the State of New York and continues to argue the point that there was a failure of the Board of Education and the Tenure Commission in the State of New York to make findings of fact in order that this petitioner might properly present his case for review by the Appellate Courts and that such lack of findings of fact have prejudiced his constitutional rights under the guarantees of the Fourteenth Amendment to the United States Constitution.

The fact that petitioner consistently seems to overlook and that evidently both the State of New York Supreme Court, Appellate Division, Third Judicial Department and New York Court of Appeals considered is that findings of fact actually were made in this case both by the Board of Education and the Tenure Commission. The original charges in this regard amounted to thirty-one (31) separately stated and numbered charges (Appendix A). The decision of the Board of Education in effect found petitioner guilty of each and every one of these charges and, therefore, made findings of fact numbered one (1) through thirty-one (31). Thereafter the Tenure Commission proceeded to dismiss certain findings of fact being charges numbered eight (8), nine (9), sixteen (16), eighteen (18), nineteen (19), twenty-one (21), twenty-two (22), twenty-five (25) and thirty-one (31) (Appendix B). There seems to be little doubt

therefore, that the findings of fact of the Tenure Commission included the facts set forth in the remaining twenty-two charges concerning which that body found to have been substantiated.

It is therefore, respectfully submitted that even if the procedures before the Board of Education were such as to require findings of fact, such specific findings of fact were made and were known to petitioner from the time of service of the specific charges upon him and such findings of fact were also made known to him by the decision of the Tenure Commission in that the twenty-two charges found to be substantiated were in effect the findings of fact of the Review Board.

POINT II.

Petitioner has not properly raised and preserved the objection that the proceedings before the Board of Education amounted to an infringement upon his guarantee of free speech and even if this question is to be considered the facts of this proceeding do not come within the sanctions of such constitutional guarantee.

The record in this matter both before the Board of Education and the Tenure Commission demonstrates conclusively that at no time during these preliminary proceedings or the inception of this matter did petitioner ever raise an objection with regard to a violation of his constitutional right of free speech. The first and initial time that any objection was raised in this regard did not come about until after the more than seven year lapse in these proceedings when these proceedings were in effect abandoned by petitioner in 1961 and by his then attorney. When petitioner, in late 1967 and early 1968 retained another attorney and continued

on with his proceedings. His new counsel attempted at that time to raise the question of a violation of his right of free speech. Obviously this objection is an afterthought and an attempt by petitioner's newly retained counsel to inject an argument into these proceedings which had not been raised at the outset.

It is therefore, respectfully submitted that any issue in this regard cannot be considered at this time. It is further respectfully submitted that this may very well be the reason why both the New York State Supreme Court, Appellate Division, Third Judicial Department and the New York Court of Appeals made no mention of this argument in any of their decisions dismissing this matter both with regard to the appeal on the merits and applications for leave to appeal to the New York Court of Appeals.

In addition petitioner's reliance on the *Pickering* case is blatantly unfounded for two reasons.

In the first instance petitioner has attempted to rely on charges twenty-one (21), twenty-two (22) and twenty-five (25) as supporting his contention concerning the violation of the free speech mandate. There seems to be no questions but that the decision on appeal in this matter did not include a consideration of these charges inasmuch as they were dismissed by the Tenure Commission.

In the second instance it is respectfully submitted that the case of *Pickering v. Board of Education*, U. S. , 88 Sup. Ct. 1731, 20 L. Ed. 2d 811 (1968), is certainly not controlling and as a matter of fact may be distinguished from the instant case. The *Pickering* case related to a teacher's exercise of his right to speak out upon issues of public importance. Such was not and is not the case insofar as the petitioner in the instant case is concerned, inasmuch as all of the matters

concerning which the petitioner was charged and which were considered by the Appellate Court in this case, and which had a bearing on the issues herein, concerned matters of internal administration, discipline and order within the school system, and particularly within the school in which petitioner was a teacher. In the case at bar, the petitioner was attempting to speak out upon matters which were not issues of public importance related to the district as a whole or matters of district policy, but which were related to internal policy matters and teaching procedures. As to these matters, petitioner was attempting to substitute his judgment for those of his duly appointed superiors and, in effect, petitioner was attempting to run the administration and teaching procedures of the school to his own liking by reason of the fact that he disapproved of those who were making such decisions and governing such teaching procedures.

Consequently, it is respectfully submitted that the *Pickering* case has no bearing in this matter and that petitioner's argument concerning an alleged violation of his right to free speech must be disregarded.

POINT III.

This Court may not review the question of substantiality and sufficiency of evidence to support the administrative termination under the guise of an alleged violation of the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution.

Petitioner has attempted upon this application to have this Court review the question of the substantiality and sufficiency of the evidence before the Board of Educa-

tion by alleging that the determination in this regard amounted to a violation of his rights under the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted that this subterfuge by the petitioner is an attempt to circumvent the applicable law in this regard which has long been established in the Federal Courts.

It has long been the rule that the Federal Court may not review the alleged arbitrariness or unreasonableness of a state administrative decision inasmuch as such issue is a matter of local and not federal consideration. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, N. C.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933 (1907).

It is further respectfully submitted that this *local question* has been reviewed and re-reviewed by the proceedings in the New York State Appellate Tribunals commencing with the review by the Tenure Commission, the Commissioner of Education, the New York State Supreme Court Appellate Division and thereafter upon two applications for leave to appeal to the New York State Court of Appeals, one having been made to the New York State Court of Appeals, one having been made to the New York State Supreme Court, Appellate Division, Third Judicial Department and one having been made to the New York State Court of Appeals. Such local question having been exhaustively reviewed by the Appellate Tribunals having proper jurisdiction and regard for these questions, the long-standing rule established by the *Atlantic Coast Line R. Co.* case must respectfully be adhered to and petitioner's contention in this regard dismissed.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Charges.

STATE OF NEW YORK

COUNTY OF HERKIMER

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 2, TOWNS OF FRANKFORT AND SCHUYLER

IN THE MATTER

of

The Removal of PHILIP CHUFF as a Teacher in Central School District No. 2 of the Towns of Frankfort and Schuyler.

JOHN F. MURPHY, as and for charges against Philip Chuff, alleges as follows:

1. I am the Superintendent of Schools of Central School District No. 2 of the Towns of Frankfort and Schuyler, Herkimer County, New York, and these charges are made for the purpose of seeking the removal of said Philip Chuff, a teacher in Central School District No. 2 of the Towns of Frankfort and Schuyler, pursuant to Section 3012, Subdivisions 2 and 3 of the State Education Law, on the grounds that said Philip Chuff has been and is guilty of inefficiency, incompetency, neglect of duties, insubordination and conduct unbecoming a teacher.

2. Upon information and belief, the said Philip Chuff has failed to keep adequate records as required by department regulations; has limited his program to development

of a sports program with little regard to a physical education program for all students; has consistently failed to organize and plan a program; has failed to keep adequate class room records; all of which has been contrary to explicit instructions of his superior and in direct violation of the rules and regulations of the State Department of Education. This allegation is based partly on my own knowledge and information and partly on knowledge and information imparted to me by the principal of the high school.

3. That said Philip Chuff has failed and neglected to perform his proper duties in a proper manner in the clearance of football equipment for conditioning purposes after the football season in 1956.

4. Upon information and belief, the said Philip Chuff has failed to follow through and insist on recognition of one of the basic fundamentals of physical education, namely cleanliness, in that he permitted gym shower and dressing room areas to be neglected by the students using same, contrary to instructions from his superiors, particularly in June, 1952, February, 1953 and February, 1956. That the source of my information and grounds of my belief are personal knowledge in part and statements made to me by the former Superintendent of Schools and board members and school board minutes of June, 1952.

5. That upon information and belief, the said Philip Chuff, contrary to the rules, regulations and instructions of his superior, established a policy which made it mandatory for all boys who wished to play basketball, to also go out for football. That the source of my information and grounds of my belief are the minutes of the Board of Education under date of November 1st, 1954, and statements made to me by individuals familiar with the aforementioned policy.

6. That upon information and belief Philip Chuff failed to provide the necessary supervision over the students under his control during the Fall of 1956, to the extent that it was necessary to formally notify him, of the lax conditions. That the source of my information and grounds of my belief were complaints made to me by individuals as a result of which the letter was directed to Mr. Chuff under date of September 28th, 1956, and the matter discussed in the minutes of the Board of Education on December 18th, 1956.

6a. That said Philip Chuff has failed and neglected to obey the orders of his superior and particularly an order given by the Superintendent of Schools on or about April 18th, 1956, that he discontinue the amount of running engaged in by male pupils during the physical education class, which matter was called to the Superintendent's attention by the Board of Education.

6b. That the said Philip Chuff disobeyed the order of the Superintendent of Schools in the Fall of 1956, which directed him not to allow students off the school premises during school hours not to run on the streets.

6c. Upon information and belief, during the months of January and February, 1955, the said Philip Chuff while in charge of gym classes would leave said class without supervision and would go to the boiler room to smoke. That the Superintendent of Schools at that time advised the said Philip Chuff to discontinue the practice of leaving the gym class unsupervised and smoking, but said Philip Chuff continued to do so in spite of the orders of his School Superintendent. That the source of my information and knowledge and grounds of my belief are statements made to me by the Superintendent of Schools during January and February, 1955.

6d. That upon information and belief, during the Spring of 1955, while the said Philip Chuff was conducting gym classes outside of the building, he would leave his group in the field without supervision and go over to lean against the school building to smoke. That this matter was called to his attention by the Superintendent of Schools on four or five different occasions, but the said Philip Chuff continued, not only to disobey the orders of the Superintendent of Schools, but failed to properly supervise the classes and continued to smoke while in charge of a class. That the source of my information and knowledge and grounds of my belief are statements made to me by the Superintendent of Schools during the Spring of 1955.

7. Upon information and belief, the said Philip Chuff, in violation of generally accepted practices, left his students under the supervision of people not authorized to supervise, contrary to direct instructions and specifically did not take the fourth period study hall on March 27th, 1957. That the source of my knowledge and information and grounds of my belief are personal knowledge and records compiled at the time by other officials of the school system.

8. That upon information and belief, the said Philip Chuff, in violation of direct instruction, failed to take his students outside for physical education in spite of good weather, particularly during the week of May 13th, 1957, but kept his students sitting in class without instruction. That the source of my knowledge and grounds of my belief are partly my own personal knowledge and records and statements made to school officials by competent individuals.

9. That said Philip Chuff during said week on May 13th, 1957, inflicted unreasonable punishment on several pupils by making them kneel on the floor.

10. That said Philip Chuff, contrary to specific instructions by his superior that all students and faculty members attend the Student Council Election Meeting on May 20th, 1957, failed to attend the greater portion of said meeting.

11. That upon information and belief, said Philip Chuff, while responsible for elementary physical education, failed to follow instructions of his immediate supervising administrator, specifically refusing to go on the gym floor area of the Sarah M. Piper School, although he sent pupils there for physical education purposes. That the source of my information and the grounds of my belief are statements made to me by the elementary school principal.

12. That upon information and belief, the said Philip Chuff, during September, 1954, while assigned by the Superintendent of Schools to assist during the noon hour program at elementary schools, refused to carry out the assignment, making it necessary to bring the matter before the Board of Education, and that on other occasions in 1948, he had refused to carry out his noon hour duty assignments, threatening to resign and requesting individuals to intercede for him. That the source of my information and the grounds of my belief are statements made to me by former Superintendent of Schools, former member of the Board of Education and the minutes of the Board of Education.

13. That said Philip Chuff knowingly violated the "Game Standards" of the New York State Public High School Athletic Association by scheduling and playing the first basketball game of the 1956-1957 season by having less than "ten organized intraschool practice sessions before the first basketball game of the season," thereby indicating the attitude of said Philip Chuff to set up his own rules as a matter of convenience. That the source of my information the grounds of my belief are the regulations

of the New York State Public High School Athletic Association, the practice schedules sessions and minutes of the Board of Education of December 18th, 1956.

14. Upon information and belief, the said Philip Chuff is unable to work with his co-teachers and co-workers in his field to the detriment of the physical education program of the school system. That the source of my information and grounds of my belief are conversations with fellow teachers in the school system.

15. That upon information and belief, that on October 22nd, 1957, Mr. Chuff, who at that time had no authority and was under suspension by the Board of Education, told students to report to the Reese Road Elementary School gym, although the school was closed under direction of the school physician, and is a further indication of the unauthorized authority assumed by Mr. Chuff, and a further indication of a practice of assigning his pupils to an unassigned program. That the source of my information and grounds of my belief are statements made by the principal of the Reese Road Elementary School and students of the high school.

16. That said Philip Chuff, in his petition to the Supreme Court of the State of New York dated September 24th, 1957, under oath, swore that there have never been any criticisms made or filed against him, and no disciplinary action taken, no difficulty of any kind involving petitioner and the school board, whereas in truth and in fact, Mr. Chuff knew at the time of signing said petition that he had been called before the Board of Education at a special meeting on December 18th, 1956, at which time he was openly criticised for the action which he was taking in matter of criticism and violation of school policy.

16a. That upon information and belief, the said Philip Chuff, on or about June 17th, 1955, after the release of

the commencement programs, called a member of the Board of Education and falsely accused him of being up to his old tricks and caught in another lie, in that he, Chuff, should have been listed as Director of Athletics on the program. That the source of my knowledge and grounds of my belief are statements made to me by the former member of the Board of Education.

17. That Mr. Chuff, on or about February 27th, 1956, at a time when the Superintendent was in his third week in his new school system, exerted great pressure on the Superintendent in demanding that he be recommended for appointment as Director of Physical Education and Health and upon being advised that the request would have to be denied at that time, the said Mr. Chuff vehemently charged unfair treatment and discrimination.

18. That upon information and belief, during the course of his employment by the school system and particularly during the years 1955, 1956, 1957, the said Philip Chuff resorted to conduct unbecoming a teacher by constantly holding over the Board of Education threats of resignation and would, at these times, request letters of recommendation, which were given to the said Philip Chuff to placate him. That this action on the part of said Philip Chuff was for the purpose of harassing and embarrassing the Board of Education and creating a condition of uncertainty, violating one of the basic premises of the tenure law, namely, stability of staff personnel. That the source of my information and grounds of my belief are conversations with members of the Board of Education.

19. Upon information and belief, the said Philip Chuff used offensive language and threats against non-teaching personnel and especially against bus personnel, particularly after the Sportsmen Outing in May of 1957. That the source of my information and grounds of my belief are conversations with Mr. Frank M. Plano, Jr., of Frankfort, New York.

20. Upon information and belief, the said Philip Chuff has engaged in conduct unbecoming a teacher in that he has at various times and places accosted members of the Board of Education and in the presence of others, severely criticised their program and particularly on December 6th, 1956, in the presence of faculty members, Mr. Chuff sharply criticised both the Board of Education and the Administration to the detriment of the school system with such comments as "The program is going backwards every day," and "He (Mr. Murphy, the Superintendent of Schools) allowed the use of ineligible players in football," and "The administration is not supporting me in basketball." That on December 14th, 1956, a similar outburst was made by said Chuff to a Board member that they made a mistake in hiring the new Superintendent, and he (Chuff) would fight him every inch of the way. Both of these outbursts were the objects of Board discussions and resulted in a special meeting being called under date of December 18, 1956. The source of my information and the grounds of my belief are conversations with former members of the Board of Education and the minutes of the Board meeting of December 18th, 1956.

21. That upon information and belief, the said Philip Chuff, during February of 1956, criticised members of the Board of Education in their thinking and action with respect to salary scale, then under consideration, stating that he considered the actions of the Board and Administration to be shortsighted and discriminatory. That the source of my information and grounds of my belief are conversations with former members of the Board of Education.

22. That upon information and belief, Mr. Philip Chuff has incorrectly maintained that he has not had support from the Board of Education in such a manner as to provide an adequate program, all to the detriment of the school system. That said statements were made to mem-

bers of the Board of Education, particularly on December 6th, 1956, December 14th, 1956 and December 18th, 1956. That the source of my information and grounds of my belief are partly on my own knowledge, partly on conversations with others and partly from the records and reports in the school system.

23. That said Philip Chuff, on many occasions, and particularly on May 6th, 1957, in the Superintendent's office, directly and openly criticised the school organization and school operation in abusive and uncontrolled language.

24. That the said Philip Chuff is constantly and has repeatedly demonstrated an attitude of resisting the school program and attempting to belittle it and to be of as little assistance as possible, openly and publicly criticising the Board of Education and the school administrators, and particularly on December 14th, 1956, when he criticised the principal of the school and later left the school without the knowledge of the principal, and as a further indication of this attitude, the said Mr. Chuff resigned as football coach just a few days before the opening of the football season in the Fall of 1956 without notice.

25. That upon information and belief, the said Philip Chuff in May or June, 1955, attempted to influence voting support at the annual meeting of the Board of Education, promising considerations, which would be beneficial to those people involved, disregarding the best interests of the school system, specifically stating that if his candidates were elected, he, Chuff, might be appointed Superintendent of Schools and would continue support of private bus contracts as against school owned buses. That the source of my information and grounds of my belief are the statements of individuals who have reported this to the Superintendent.

26. That upon information and belief, said Philip Chuff contrary to the rules and regulations of the school system

left the school premises during school hours during the year of 1954, for the purpose of, among other things, attempting to influence members of the Board of Education against the then Superintendent of Schools. That the source of my information and grounds of my belief are statements made to me by members of the Board of Education.

27. Upon information and belief, the said Philip Chuff during the month of February, 1955, came to the office of the Superintendent of Schools and in a loud, boisterous and threatening voice accused the Superintendent of being unfair in rating him and advised the Superintendent that he would "get him for this." That the source of my information and knowledge and the grounds of my belief are statements made to me by the then Superintendent of Schools.

28. Upon information and belief, on or about the 2nd day of March, 1955, the said Philip Chuff broke into the office of the Superintendent of Schools, where the Superintendent and a member of the Board of Education were conferring, and violently and boisterously accused both of being prejudiced and preventing him from getting a raise. That is the course of the conversation, the said Philip Chuff pounded his fist upon the desk, threatened the member of the Board of Education and stated to him, "Your face ought to be slapped." That the source of my information and knowledge and grounds of my belief are statements made to me by the member of the Board of Education and the Superintendent of Schools, who were present at the time.

29. That upon information and belief, on or about the 6th or 7th day of December, 1956, the said Philip Chuff, contrary to instructions that he check eligibility the early part of the week, went, the latter part of the week, to the office of the principal to check eligibility of players and

charged the principal with inconsistency and partiality. That thereafter, said Mr. Chuff went to the office of the Superintendent repeating the same charges shortly thereafter returned to the Superintendent's office with a number of students and in the presence of students repeated the same charges and in the presence of said students stated that the administration had allowed the use of ineligible players in football. At that time, the said Mr. Chuff left the office with the threat that he was going to investigate the whole program. That the source of my information and knowledge and grounds of my belief are partly my own knowledge and partly statements made by the principal.

30. Upon information and belief, the said Philip Chuff violated the regulation of the State Department of Education of which he had notice on June 4th, 1956, with reference to the handling of extra curricular class room funds, particularly the accounts under the heading of Frankfort High Rifle Club and Sportsman's Club. That the source of my information and knowledge and grounds of my belief are partly my own knowledge and bank records.

31. That upon information and belief, the said Philip Chuff never merited nor received the recommendation of the Superintendent of Schools during the eleven years that he was employed in the school system, which recommendation as to competency and fitness was and is required by law. That the source of my information and grounds of my belief are records in the school system.

I hereby prefer the above charges for the removal of the said Philip Chuff pursuant to Section 3012. Subdivisions 2 and 3 of the State Education Law.

Dated: Frankfort, New York, November , 1957.

JOHN F. MURPHY,
Superintendent of Schools,
Central School District No. 2.

APPENDIX B.

Opinion of Tenure Commission.

STATE TENURE COMMISSION

IN THE MATTER

of

The Removal of PHILIP CHUFF, as a Teacher in Central School District #2 of the Towns of Frankfort and Schuyler.

Argued June 30, 1958.

Commissioners:

John T. DeGraff, *Chairman,*
Mrs. Robert Curtis Osborn,
Mrs. Homer Bunnell,
William T. Conklin,
Alfred T. Peters.

Appearances:

Fred J. O'Donnell, Attorney for Appellant.
Albert L. Lawrence, Attorney for School District, Daniel J. Blaugrund, of Counsel.

RECOMMENDATION

This is an appeal, pursuant to Section 3012 of the Education Law, from a determination of the Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler, dismissing the appellant, Philip Chuff, as a teacher in said School District. The unanimous de-

termination of the five members of the Board who conducted the hearing, was made on December 31, 1957, following hearings held on December 9, 10, 11, 16, 17, 18 and 19, 1957. The notice of appeal, dated December 28, 1957, was received by the Tenure Commission on or about January 4, 1958.

The Tenure Commission was notified in a letter from the attorney for the petitioner, dated January 15, 1958, that the preparation of the transcript of the testimony taken before the Board would be delayed and that the Tenure Commission would be informed of the date of completion of the record so that a hearing could then be scheduled. The Commission was subsequently informed, by letter dated June 5, 1958, that the record had been completed and that the parties were ready to proceed with the hearing.

The hearing was held in Albany on June 30, 1958 and the issues were argued by Fred J. O'Connell, Esq., 53 West Street, Ilion, New York, on behalf of appellant, and by Daniel J. Blaugrund, Esq., 273 West Main Street, Herkimer, New York on behalf of respondent.

Before the hearing, the attorneys for the respective parties stipulated as follows:

1. That the provisions of Section 3012 of the Education Law, which require that the hearing before the Tenure Commission shall be held "not less than ten nor more than thirty days after notice of such an appeal has been received" are waived by the respective parties and the parties consent that the hearing be held on June 30, 1958.

2. That the issues may be submitted to and determined by the full membership of the Tenure Commission, despite the inability of two members to attend the hearing, on the basis of the record filed with the Tenure Commission as hereinafter set forth in paragraph 4.

3. That any time limitations that might exist in relation to the filing of the determination of the Tenure Commission are waived by the parties who expressly agree that the Tenure Commission may have such time as may be necessary for the filing of its recommendations with the Commissioner of Education.

4. That the issues are to be submitted to and determined by the Tenure Commission on the following record as submitted by the respective parties:

a. Notice of Appeal;

b. Charges;

c. Notice of suspension;

d. Answer;

e. Decision;

f. Transcript of testimony before the school board;

g. Plaintiff's exhibits numbered 1 to 23 inclusive;

h. Defendant's exhibits numbered A to V inclusive (Defendant's Exhibit W could not be found by either of the parties to the appeal).

The proceeding which is the subject of this appeal was initiated by charges dated November 7, 1957, made by John F. Murphy, Superintendent of Schools of Central School District No. 2. They comprise thirty-six separate numbered allegations characterized as "charges". Charges 1 and 2 are general in nature. The others are specific and could more properly be termed specifications in support of the general allegations contained in the first two charges.

The first charge alleges that appellant was guilty of inefficiency, incompetency, neglect of duties, insubordination, and conduct unbecoming a teacher.

The second charge alleges appellant's failure to keep adequate records as required by department regulations; his failure to develop a physical education program for all students; his consistent failure to organize and plan a program; his failure to keep classroom records; all of which, it is alleged, has been contrary to explicit instructions of his superior and in direct violation of the rules and regulations of the State Department of Education. The detailed specifications in support of these general charges are set forth in the remaining 34 allegations which refer to specific acts or incidents too numerous to summarize here.

On November 29, 1957, the appellant served an answer containing fifteen numbered paragraphs which, in substance, denied the charges and alleged that they were insufficient as a matter of law.

We have carefully reviewed the record on appeal, as stipulated by the parties, including the 45 exhibits and the testimony of the witnesses which takes up about 488 pages of the typewritten transcript.

We find that some of the charges are insufficient as a matter of law, unsubstantial, or not established by competent evidence. The basic charges are, nevertheless, supported by abundant evidence and we are of the unanimous opinion that the Board was fully justified in its decision that the teacher should be dismissed.

The charge that the teacher had not acquired tenure (Charge 31) was manifestly erroneous and insufficient on its fact as a matter of law. The continued employment of the teacher after the conclusion of his three years probationary term operated to give him tenure, as a matter of law, despite the fact that the superintendent of schools failed to recommend him for tenure.

Matter of Appeal of Eulalie Mary Sanders—(1951) 72 St. Dept. (Educ. 39).

Charges which we regard as unsubstantial or which were not established by competent evidence include those numbered 8, 9, 16, 18, 19, 21, 22 and 25. Although we feel that a few of the charges should have been dismissed by the Board and that some others were somewhat broader than the proof, the fact remains that most of the charges involved matters of substance and this record contains ample evidence to justify the Board in dismissing this teacher for insubordination, neglect of duty, failure to maintain required records, and conduct unbecoming a teacher. Indeed, several of the charges are substantiated in whole or in part by the appellant's own testimony.

The record as a whole discloses a continued refusal to follow orders and directives coupled with an attitude of long standing on the part of the appellant that was prejudicial to the orderly conduct of the school system (*Matter of Catone v. Hopkins*, 6 A. D. [2d] 972).

The appellant's attorney argues that the decision of the Board is defective because it "does not constitute a finding of guilt" and also because it contains no formal "findings". It is true, as appellant's attorney points out, that findings have been required by the Courts on certain proceedings to review the determination of administrative or quasi-judicial agencies.

N. Y. Water Service Corp. v. Water Power & Control Com., 283 N. Y. 23, 29;
Matter of Guernsey Breeders Co-op. v. Noyes, 284 N. Y. 197;
Matter of Elite Dairy Produces, Inc., v. Ten Eyck, 271 N. Y. 488;
Matter of Barry v. O'Connell, 303 N. Y. 46;
Matter of Fink v. Cole, 1 N. Y. 2d 48.

Findings were required in *Matter of Wood v. Board of Education*, 267 App. Div. 959. That case involved the dismissal of a teacher under Section 2573 of the Education

Law where the statute (sd. 6) specifically authorizes review by a proceeding under C.P.A. Article 78. The time limitations in the statute under which this appeal is taken (Education Law, Sec. 3012) do not seem to contemplate formal findings by the Board. Sd. 3 of Section 3012 declares:

> "After each side has completed its case at the hearing, the board of education may by a majority vote dismiss said teacher from its service or may defer action regarding the decision for a period not to exceed five days."

Whether formal findings shall be required seems to depend, according to the reported decisions, on the nature of the issue to be reviewed. Findings are not mandatory in all courts or in all administrative agencies. (Powers of the New York Court of Appeals, by Cohen and Karger, Sec. 132, pg. 542). We know of no reported decisions which require findings on a review by an administrative agency such as the Tenure Commission, as distinguished from a review by the Court.

With the exceptions hereinafter noted, we know of no reported decisions which require formal findings in disciplinary or removal proceedings under Sec. 3012 of the Education Law or the comparable provisions in Section 22 of the Civil Service Law. The general rule in such cases is whether there is "substantial" evidence to support the determination under review.

Matter of Miller v. Kling, 291 N. Y. 65;
Matter of Leeman v. O'Connell, 281 App. Div. 299, 300;
Matter of Harvey v. Catherwood, 268 App. Div. 1016, aff'd 295 N. Y. 843.
Powers of the New York Court of Appeals by Cohan and Karger, Sec. 108, pg. 460.

The Appellate Division, Third Department, has recently held, however, that findings may be required when the issue under review is whether the appellant has suffered "an excessive penalty" (C.P.A. Sec. 1296, sd. 5-a enacted by Laws of 1955, ch. 661); *Matter of Stotz v. Board of Regents*, 4 A. D. 2d 361; *Matter of Piper v. Lubin*, 4 A. D. 2d 612. In both of these cases, the Court adopted the rule that "* * * we cannot insist upon a statement of reasons when there is not apparent disproportion between the nature of the offense and the extent of the punishment" (p. 365).

No such disproportion exists in the case now before us where the charges and the evidence in the record abundantly justified the penalty of dismissal. Under such circumstances, we do not believe that formal findings by the Board are essential to an adequate review of the issues.

We find no merit in the other objections in point of law raised by appellant's attorney. We feel that these objections are so lacking in substance that they do not require discussion other than to mention that the Commission has considered and rejected the appellant's contentions that (1) the charges are insufficient on their face as a matter of law; (2) that the Board had no jurisdiction to entertain the proceeding or to hold a hearing on such charges; (3) that the decision of the Board is jurisdictionally defective in form; (4) that the Board divested itself of jurisdiction by failing to render a proper decision within five days after the hearing (the decision was handed down two days after the conclusion of the hearings); (5) that the Tenure Commission has jurisdiction to hear this appeal, but that there is nothing for the Tenure Commission to review.

We have entered into the foregoing discussion of the law because the statute (Education Law, Sec. 3012, sd. 3) requires the Tenure Commission to consider the appeal "both as to law and fact". Because a majority of the

members of the Tenure Commission are not lawyers, we have discussed the law with reluctance, fortified, however, by the knowledge that under the statute our conclusions are expressed in the form of a "recommendation" to the Commissioner of Education whose decision alone shall be "final".

For the foregoing reasons, the members of the Commission participating in this decision unanimously recommend that the determination of the Board be affirmed.

s/ JOHN T. DEGRAFF
s/ AGDA S. OSBORN
s/ DOROTHY B. BUNNELL
s/ ALFRED T. PETERS

Hon. William T. Conklin took no part in the consideration or determination of this appeal.